[Case Title] In re Expresstrak, L.L.C.
[Case Number] 03-67235-PJS
[Bankruptcy Judge] Hon. Phillip J. Shefferly
[Adversary Number]XXXXXXXXXX
[Date Published] January 20, 2004

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE:

Expresstrak, L.L.C.,	Case No. 03-67235
	Chapter 11
Debtor.	Hon. Phillip J. Shefferly

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OPINION (1) DENYING AMTRAK'S MOTION FOR DETERMINATION THAT AUTOMATIC STAY DOES NOT APPLY; (2) STAYING DEBTOR'S MOTION TO ASSUME EXECUTORY CONTRACTS; (3) MODIFYING THE AUTOMATIC STAY FOR THE LIMITED PURPOSE OF PERMITTING THE PARTIES TO CONTINUE LITIGATION IN THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA; AND (4) GRANTING AMTRAK'S MOTION FOR RELIEF FROM AUTOMATIC STAY WITH RESPECT TO THE BOND

I. Introduction

The Debtor was established for the purpose of entering into a joint venture with National Railroad Passenger Corporation ("Amtrak") to provide express, non-passenger services in conjunction with Amtrak's passenger service. The relationship has lead to much litigation, and eventually this Chapter 11 bankruptcy. This matter is before the Court initially upon the Debtor's Motion for Entry of Order Authorizing Debtor to Assume Contracts with Amtrak ("Motion to Assume"). It is also before the Court upon Amtrak's Motion for (I) a Determination That The Automatic Stay Does Not Require Amtrak to Continue Providing Services to Expresstrak Under Terminated Leases and (II) Relief From the Stay to Allow Amtrak to Access Pre-Petition Bond and to Liquidate Claim, if Prosecuted by Debtor ("Amtrak Motion"). Pursuant to this Court's order of October 29, 2003, the Amtrak Motion was heard at the same time as the Motion to Assume. On November 21, 2003, oral argument was held and, on December 5, 2003, the parties filed post-hearing

briefs to supplement the pleadings that they had already filed. For the reasons that follow, the Motion to Assume is stayed, the Amtrak Motion is granted in part and denied in part, and the automatic stay is lifted for the limited purpose of permitting the parties to continue litigation pending in the District Court for the District of Columbia.

II. Jurisdiction

This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (G), over which this Court has jurisdiction under 28 U.S.C. §§ 1334(a) and 157(a).

III. Facts

On October 27, 1999, after approximately three years of negotiations, the Debtor and Amtrak executed an Operating Agreement that provided for the transportation of perishable goods (fruits, vegetables, meat, cheese, and other food products) in temperature-controlled railcars, which were to be attached to Amtrak's inter-city passenger trains. (Debtor's Mot. to Assume, Ex. B.) Under the Operating Agreement, which envisioned the use of up to 350 such cars, the Debtor committed to acquiring railcar "hulks" that would be refurbished to Amtrak's standards. The Operating Agreement contemplated that the Debtor would cause the refurbished railcars to be conveyed to a third party lessor who, in turn, would lease the railcars to Amtrak, and Amtrak would then sublease them to the Debtor. Pursuant to this arrangement, Amtrak would make the lease payments to the third party lessor and the Debtor would simultaneously pay an equal amount to Amtrak under the sublease.

After the Operating Agreement was finalized, Orix Financial Services, acting as a third party lessor, agreed to purchase 110 railcars and, on May 15, 2001, Orix executed a lease with Amtrak which required Orix to lease these cars to Amtrak. On the same day, Amtrak entered into a Sublease ("Sublease") with the Debtor in which Amtrak agreed to sublease the 110 cars to the Debtor. (Debtor's Mot. to Assume, Ex. C.) In November, 2001, after financing 55 of the 110 cars, Orix

suspended its funding. Amtrak and the Debtor subsequently entered into a letter agreement ("Direct Lease") on November 30, 2001, whereby Amtrak agreed to purchase the 55 remaining railcars from the refurbishing vendor, and lease them to the Debtor. (Debtor's Mot. to Assume, Ex. D.) The letter agreement stated that: "Under the Direct Lease, Amtrak and ExpressTrak shall have substantially the same rights and obligations with respect to the railcars made subject thereto as each currently holds with respect to the railcars subject to the Sublease . . ." (Id. at 1.) Although the parties contemplated executing a more formal document, they never did.

By letters dated April 15, 2002, Amtrak informed the Debtor that because the Debtor had failed to make its January and April, 2002 payments, it was in default under the Sublease and the Direct Lease (collectively, the "Leases") and, therefore, Amtrak was terminating the Leases. (Amtrak's Mot., Ex. 4-6.) Amtrak also demanded return of all express cars leased to the Debtor under the Leases. The Debtor paid Amtrak the overdue amounts on April 17, 2002 and, by letter of April 25, 2002, denied that it had defaulted under the Leases. (Debtor's Mem. of Law, Ex. B.) The Debtor asserted that the April 15, 2002 notice of default was "ineffective and unenforceable", that Amtrak could not unilaterally "demand return of the express cars", and that Amtrak had "defaulted on numerous obligations under [the] amended operating agreement." (Id. at 1.) In an attempt to resolve their differences, the parties operated under a standstill agreement from May 3, 2002 to September 8, 2002. Under the standstill agreement, Amtrak continued to run the express cars with the Debtor's freight.

On September 9, 2002, Amtrak filed suit against the Debtor in the District Court for the District of Columbia, alleging that the Debtor had defaulted under the Leases when it failed to make timely payments, and seeking declaratory relief and damages. In response, the Debtor made a demand for arbitration, and moved for a stay of the litigation pending arbitration and an order compelling

Amtrak to continue conducting business based upon a provision in the Operating Agreement that required the parties to submit their disputes to arbitration. On October 15, 2002, the Debtor filed a separate suit against Amtrak in the District Court for the District of Columbia seeking injunctive relief and an order compelling arbitration. The District Court consolidated the two lawsuits. On December 5, 2002, the District Court ruled that the dispute resolution provisions of the Operating Agreement governed the parties' dispute. The District Court then stayed the lawsuit and directed the parties to submit their disputes to arbitration. At the same time, the District Court entered an order requiring the parties to continue to conduct business while such arbitration proceedings were pending.

On January 27, 2003, the District Court heard testimony regarding alleged damages that Amtrak would suffer as a result of the injunction that had been entered. Based upon the testimony, the District Court ordered the Debtor to post a bond by February 15, 2003. Further proceedings took place before the District Court regarding the bond, which resulted in an order on March 11, 2003 that directed the Debtor to post a bond by March 14, 2003 in the amount of $110,000 ("Bond"). (Amtrak's Mot., Ex. 9.) The Debtor posted the Bond.

On June 6, 2003, on expedited appeal, the United States Court of Appeals for the District of Columbia Circuit reversed the District Court's order compelling arbitration and found that the default and remedy provisions contained in the Leases superceded the arbitration provisions of the earlier executed Operating Agreement. National Railroad Passenger Corp. v. Expresstrak, L.L.C., 330 F.3d 523, 530-31 (D.C. Cir. 2003). The Court of Appeals further found that the dispute between Amtrak and the Debtor was not properly arbitrable. Id. at 531. As a result, the Court of Appeals reversed both the order compelling arbitration as well as the injunction, and remanded the case to the District Court for trial on the parties' breach of contract and other claims.

After the ruling by the Court of Appeals, Amtrak notified the Debtor in writing on June 25,

2003 that it would no longer accept for movement any loads tendered by the Debtor on the 55 railcars that were the subject of the Sublease. On September 16, 2003, Amtrak sent a similar notification regarding the railcars leased pursuant to the Direct Lease. On September 15, 2003, Amtrak filed its First Amended Complaint in the District Court for the District of Columbia. (Amtrak's Mot., Ex. 14.) On September 25, 2003, the Debtor filed its Answer and Counterclaim to the First Amended Complaint. (Id., Ex. 15.) On October 3, 2003, the Debtor filed a voluntary petition for relief under Chapter 11 in this Court. At the time of the commencement of the bankruptcy case, Amtrak was still accepting loads for the railcars under the Direct Lease, but not for the railcars under the Sublease.

On October 8, 2003, the Debtor filed the Motion to Assume. In it, the Debtor seeks to assume the Operating Agreement, the Sublease, and the Direct Lease. Amtrak objects and argues that the Operating Agreement, Direct Lease, and the Sublease cannot be assumed because they were all terminated pre-petition. As such, they are not "executory" contracts and therefore cannot be assumed pursuant to § 365(a) of the Bankruptcy Code. The Debtor counters that these contracts were not lawfully terminated pre-petition because Amtrak, through a course of performance, had waived its right to insist upon strict compliance with the payment dates set forth in the Leases. As a consequence, the Debtor contends that it was not in default of the Leases and, therefore, the Leases were not terminated pre-petition and may now be assumed by the Debtor under § 365(a). After receiving the Motion to Assume, Amtrak filed the Amtrak Motion requesting a declaration from this Court that the automatic stay of § 362 does not apply. As a consequence, Amtrak asserts that it is free to discontinue providing any further services to the Debtor and is able to repossess the railcars. Further, the Amtrak Motion seeks a modification of the automatic stay to permit Amtrak to request that the District Court for the District of Columbia release the Bond to Amtrak.

IV. Amtrak's Motion to Determine the Automatic Stay Does Not Apply

The Amtrak Motion seeks a determination that the automatic stay of § 362(a) does not apply so as to "compel it to continue providing services to [the Debtor]." (Amtrak's Mem. of Law at 13.) Amtrak's request for relief in this regard is premised upon its assertion that the Operating Agreement and Leases have terminated and, therefore, the Debtor has no property interest that is protected by the automatic stay of § 362. Amtrak requests a declaration that the automatic stay does not apply. For the following reasons, the Court concludes that the requested relief is not warranted procedurally or substantively.

The Amtrak Motion recites that it is brought pursuant to L.B.R. 4001 and 9014-1. (Amtrak's Mot. ¶ 33.) The specific relief requested by Amtrak is a declaration that the automatic stay does not apply so as to require Amtrak to continue providing services to the Debtor under terminated leases. L.B.R. 4001(a)(1) outlines the procedure for filing "a motion for relief from an automatic stay provided by the Code." Section 362(d) of the Bankruptcy Code provides that a party may request and the Court may grant it "relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay . . . ." Section 362(d) on its face does not indicate that among the authorized "relief from the stay" is a declaration that the automatic stay is inapplicable to the conduct of a party.

The Debtor argues that Amtrak is really seeking a declaration that Amtrak has the right to recover the railcars in the Debtor's possession because the Debtor has no legal interest in the railcars due to the pre-petition termination of the Operating Agreement and Leases. (Debtor's Mem. of Law at 51.) The Debtor also asserts that this request for relief may only be brought as an adversary proceeding under Fed. R. Bankr. P. 7001(1), (2) and (9). (Id.) Those subsections of Rule 7001 require adversary proceedings, respectively, to (1) recover money or property; (2) determine the validity of a lien or other interest in property; and (9) obtain a declaratory judgment relating to any

of the foregoing. Because the requested relief is not a termination, annulment, modification or conditioning of the automatic stay, Amtrak's requested relief must, according to the Debtor, be brought by adversary proceeding.

Section 362(d) is the authority to request "relief" from the stay, but it does not contain an exclusive list of the forms of relief that may be sought. Rather, it has a non-exclusive list of examples of relief. Although a determination that the stay is "inapplicable" is not among those listed in § 362, there is nothing on the face of § 362(d) that would preclude that form of relief from being requested under § 362(d). Fed. R. Bankr. P. 7001, while spelling out those proceedings that must be commenced as adversary proceedings, does not recite that all requests for declaratory judgment must be brought by adversary proceeding, but only that declaratory judgments "relating" to the "foregoing" subsections of Fed. R. Bankr. P. 7001 must be brought by adversary proceeding. Although it is true that the Amtrak Motion seeks declaratory relief, it is necessary to examine the substance of the declaration sought in order to determine whether it is a declaratory judgment that must be brought as an adversary proceeding.

It is clear from an examination of the Amtrak Motion and supporting pleadings that the underlying reason for the declaratory relief sought by Amtrak is to enable Amtrak to prevent the Debtor from using Amtrak's railcars or obtain other services from Amtrak under the Leases. Because the substance of Amtrak's requested relief is to prevent the Debtor from using Amtrak's railcars or other services under the Leases, Amtrak is, in fact, seeking to recover property in which the Debtor claims an interest. At the hearing, the Court questioned Amtrak about how it would proceed if the stay was found to be inapplicable. Amtrak answered that it would renew its notice seeking to repossess the remaining railcars. Because the purported basis for Amtrak's right to repossession is that the Debtor no longer has an interest in the railcars under the Operating Agreement and Leases, Amtrak is

in substance requesting the Court to determine the extent of the Debtor's interest in the railcars and leases. Although not styled as an action to recover property from the Debtor or determine the extent of the Debtor's interest in the property, the declaration requested by Amtrak does "relate to" proceedings to recover property or determine the extent of an interest in property of the estate, and, therefore, is the type of declaratory judgment that must ordinarily be brought as an adversary proceeding under Fed. R. Bankr. P. 7001(9).

However, even if this Court were to disregard the Debtor's procedural objection or decide that the declaratory relief sought by Amtrak is not of the type for which an adversary proceeding is required, this Court is not persuaded that there is substantive merit to Amtrak's position that the automatic stay does not apply. It appears to the Court that the actions of Amtrak are intended, among other things, to obtain possession of property in which the estate claims an interest (i.e., the railcars). That is an act that is certainly covered by the automatic stay provisions of § 362(a)(3). Even if it is ultimately determined that the estate has no interest in the railcars, the mere act of recovery or possession of the railcars from the estate is similarly stayed by § 362(a)(3). Further, the request for a declaration that the stay is inapplicable is undertaken by Amtrak for the purpose of exercising control over property of the estate and is therefore stayed by § 362(a)(3). In short, unless and until such time as there has been adjudication that the Operating Agreement and Leases were terminated pre-petition, the automatic stay does apply and continues to prevent creditors, including Amtrak, from taking acts against the Debtor, the railcars, or the Operating Agreement and Leases pursuant to § 362(a) of the Bankruptcy Code. The question of whether the Operating Agreement and Leases were terminated pre-petition is the threshold issue presented in the Debtor's Motion to Assume.

V. The Debtor's Motion to Assume

The Debtor's Motion to Assume is brought under § 365(a) of the Bankruptcy Code, which

provides that a debtor "may assume or reject any executory contract or unexpired lease . . . ." Fed. R. Bankr. P. 6006(a) provides that a request to assume an executory contract or unexpired lease under § 365(a) of the Bankruptcy Code is governed by Rule 9014. The Debtor properly filed the Motion to Assume under Fed. R. Bankr. P. 9014.

After reviewing the Motion to Assume and the responsive pleadings filed by Amtrak, the Court conducted a hearing on November 21, 2003. The critical question that arose in the parties' pleadings and at the November 21, 2003 hearing is whether or not the Operating Agreement and Leases are "executory" or "unexpired" such that the Debtor may assume them under § 365(a) of the Bankruptcy Code. Both Amtrak and the Debtor agree that if the Operating Agreement and Leases were in existence and not expired or terminated prior to the bankruptcy case, then they could be assumed under § 365(a) of the Bankruptcy Code. On the other hand, "whatever rights the debtor has in property at the commencement of the case continue in bankruptcy - no more, no less." 8 Collier on Bankruptcy ¶ 365.03[2] (15th ed. rev. 2003) (citing Moody v Amoco Oil Co., 734 F.2d 1200, 1213 (7th Cir. 1984)). Thus, if the Operating Agreement and Leases were expired or terminated prior to the commencement of the bankruptcy case, then there is nothing left for the Debtor to assume under § 365(a) of the Bankruptcy Code.

Amtrak states that the Operating Agreement and Leases were unequivocally terminated pre-petition because of the notices of termination that had been issued by Amtrak before the commencement of the bankruptcy case. The Debtor argues that the notices of termination sent by Amtrak did not effectively terminate the Operating Agreement and Leases because there was a course of performance between Amtrak and the Debtor pursuant to which Amtrak had waived its right to require strict adherence to contractually specified payment due dates. As a result, the Debtor contends that the Operating Agreement and Leases were not terminated pre-petition and can be assumed by the

Debtor under § 365(a).

Although both parties agree on what the critical issue is, they disagree as to whether and how this Court can or should decide it. The Debtor argues that, if there is a threshold issue as to whether a contract or a lease has been terminated before a bankruptcy was filed, that threshold issue must be addressed by the bankruptcy court in connection with the hearing on the Motion to Assume. If that hearing requires the resolution of disputed factual issues, then there must be an evidentiary hearing conducted after appropriate discovery. The Debtor argues that there is no basis procedurally or substantively to truncate the proceedings on a motion to assume an executory contract and that an expedited hearing is not required. On the other hand, Amtrak argues that a motion to assume an executory contract is generally a summary proceeding and not the place for an extended breach of contract lawsuit. In support, Amtrak cites Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.), 4 F.3d 1095 (2d Cir. 1993) and In re Sixth Avenue Corp., 191 B.R. 295, 301 (Bankr. S.D.N.Y. 1996), for the proposition that bankruptcy courts, in considering a motion to assume or reject a contract or lease, should not engage in extensive, lengthy litigation to resolve factual disputes.

In the Court's view, if there are no factual issues regarding whether a contract or lease has been terminated pre-petition, the Court can and should make a threshold determination that a contract or lease is executory or unexpired in the context of a hearing on a motion to assume brought under Fed. R. Bankr. P. 9014. The problem in this case is that there is not simply a legal issue of whether the Operating Agreement and Leases have been terminated pre-petition. Rather, there are genuine issues of fact. For example, the Debtor alleges that there has been a course of performance that renders the cancellation notices sent by Amtrak ineffective. Amtrak denies the existence of such course of performance. Without an evidentiary hearing, the Court cannot make any findings one way or the other

regarding any alleged course of performance and, therefore, cannot fairly determine whether there occurred a course of performance that would have the legal consequence of nullifying the cancellation notices sent by Amtrak. Amtrak contends that the Court need not adjudicate any facts regarding any alleged course of performance but should simply accept the cancellation notices on their face. If it turns out that the Debtor is correct and that the termination notices are legally ineffective because of the course of performance between the parties, Amtrak maintains that the Debtor will still have an effective remedy in the form of a breach of contract suit against Amtrak. The difficulty with this analysis, however, is that it essentially strips the Debtor of the potential use of § 365 of the Bankruptcy Code. That section was intended to grant the Debtor an option whether to assume, and to continue to perform, an executory contract or to determine whether a pre-petition executory contract should be rejected because it is not in the Debtor's best interest. To deprive the Debtor of the option of continuing performance and to restrict the Debtor to a cause of action for damages for breach of contract effectively deprives the Debtor of the benefits conferred upon it by § 365. It is not enough to say that a wrongful termination still leaves the Debtor with a damage claim that it can assert if the termination by the non-debtor party has been wrongful. Accordingly, the Court concludes that all of the issues raised by the Motion to Assume and by Amtrak's objections cannot be resolved without an evidentiary hearing.

At the hearing on November 21, 2003, although Amtrak and the Debtor disagreed on the need for an evidentiary hearing, both parties conceded that, if there is to be an evidentiary hearing on the Motion to Assume, then each party will need to take some discovery in order to adequately prepare for such hearing. The Debtor requested a discovery period of approximately eight months based upon the schedule that the parties had negotiated in the lawsuit pending in the District Court. Amtrak requested a shorter discovery period because it did not believe that all of the issues raised in the

District Court lawsuit would have to be addressed at a trial on the Motion to Assume.

Fed. R. Bankr. P. 9014(a) provides that for contested matters governed by that rule "relief shall be requested by motion . . . ." Fed. R. Bankr. P. 9014(c) provides that "unless the court directs otherwise," the various discovery and other pretrial procedures set forth in part 7 of the Bankruptcy Rules for application to adversary proceedings also apply to contested matters under Fed. R. Bankr. P. 9014. However, in the Bankruptcy Court for the Eastern District of Michigan, pursuant to Order Suspending Local Bankruptcy Rule 7026-1(b), Administrative Order #00-04 entered on December 4, 2000, the various discovery proceedings under part 7 of the Bankruptcy Rules that are made applicable to contested matters through Fed. R. Bankr. P. 9014 are held not to apply to contested matters unless the court orders otherwise in a particular case. Ordinarily then, in the Bankruptcy Court for the Eastern District of Michigan, discovery does not take place in connection with a contested matter such as a motion to assume an executory contract brought under Fed. R. Bankr. P. 9014 unless the court orders otherwise. However, where a motion brought under Fed. R. Bankr. P. 9014 does involve evidentiary issues that need discovery, the Court can issue an order permitting the parties to take discovery and then set an appropriate schedule to try the evidentiary matter.

The real question in this case, however, is not whether the Court *can* conduct an evidentiary hearing and provide for discovery, but rather whether it *should* do so in light of the fact that there is a pending lawsuit in the District of Columbia District Court between Amtrak and the Debtor that encompasses the same issues as would be addressed by this Court in the context of an evidentiary hearing on the Motion to Assume. Although neither party specifically requested relief from the stay in their motions in order to continue the litigation in District Court, at the hearing, the Debtor acknowledged that all of the issues before this Court relating to the two motions are also before the District Court. (Tr. Nov. 25, 2003 at 25-26.) The Debtor stated its willingness to have those issues

adjudicated in that forum, and to return to this Court for enforcement of any judgment. On the other hand, Amtrak agreed to return to District Court only if this Court first determined that the stay did not preclude Amtrak from terminating services as to the remaining railcars. (Id. at 34-35, 52-53.)

A bankruptcy court may sua sponte modify the stay to allow litigation commenced pre-petition in another forum to continue. See Elder-Beerman Stores Corp. v. Thomasville Furniture Indus. Inc. (In re Elder-Beerman Stores Corp.); 195 B.R. 1019, 1023 (Bankr. S.D. Ohio 1996); In re Laventhol & Horwath, 139 B.R. 109, 116 n.6 (Bankr. S.D.N.Y. 1992). Courts have examined several factors in considering such relief. In Sonnax Industries, Inc. v. Tri Component Products Corp. (In re Sonnax Industries, Inc.), 907 F.2d 1280 (2d Cir. 1990), the Second Circuit addressed whether the stay should be lifted in a chapter 11 case to allow a civil antitrust action to proceed in state court. 907 F.2d at 1282. The court weighed the following factors:

> (1) whether relief would result in a partial or complete resolution of the issues; (2) lack of any connection with or interference with the bankruptcy case; (3) whether the other proceeding involves the debtor as a fiduciary; (4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action; (5) whether the debtor's insurer has assumed full responsibility for defending it; (6) whether the action primarily involves third parties; (7) whether litigation in another forum would prejudice the interests of other creditors; (8) whether the judgment claim arising from the other action is subject to equitable subordination; (9) whether movant's success in the other proceeding would result in a judicial lien avoidable by the debtor; (10) the interests of judicial economy and the expeditious and economical resolution of litigation; (11) whether the parties are ready for trial in the other proceeding; and (12) impact of the stay on the parties and the balance of harms.

Id. at 1286 (citing In re Curtis, 40 B.R. 795, 799-800 (Bankr. D. Utah 1984)); see also In re Johnson, 115 B.R. 634, 636 (Bankr. D. Minn. 1989) (applying factors to a breach of contract claim, and focusing on prejudice to and respective hardships on the debtor and the creditor).

After reviewing the arguments of the parties and the pleadings in the District Court case, the Court concludes that there are substantial reasons that dictate that the parties litigate their dispute in the District of Columbia District Court rather than commence and conduct a duplicative proceeding

before this Court.

First, as explained above, it is the Court's view that there are genuine and substantial issues of fact that will need to be adjudicated in order to render a decision as to whether or not Amtrak terminated the Operating Agreement and Leases pre-petition. However, conducting discovery and litigating the factual issues regarding the course of performance or course of dealing between the parties under the Operating Agreement and the Leases will be duplicative of the proceedings in the District Court for the District of Columbia. Parallel litigation over the Operating Agreement and Leases in two forums is not sensible and will not provide a benefit to the Debtor's estate and its creditors. Judicial economy dictates that only one proceeding be conducted to litigate these issues.

Second, if there is only going to be one proceeding to litigate these issues, it is generally the second court which will stay its action and defer to the court where the matter was first filed. Urbain v. Knapp Brothers Manufacturing Co., 217 F.2d 810, 815 (6th Cir. 1954). In this case, the litigation between Amtrak and the Debtor over the Operating Agreement and the Leases commenced in the District Court for the District of Columbia on September 9, 2002, more than a year before the Debtor filed the Motion to Assume.

Third, not only was the action in the District Court for the District of Columbia commenced over a year in advance of the Motion to Assume, but the litigation between the parties that has taken place in that court has been extensive. On December 5, 2002, the United States District Court for the District of Columbia issued an opinion regarding the arbitrability of the disputes between Amtrak and the Debtor. National Railroad Passenger Corp. v. Expresstrak, L.L.C., 233 F. Supp. 2d 39 (D.C. 2002). After issuing that opinion, the District Court subsequently conducted an evidentiary hearing on January 27, 2003. Among other evidence, the Court heard testimony regarding the Debtor's financial condition and the expenses incurred by Amtrak in the continuation of its business with the

Debtor under the Operating Agreement and the Leases. That hearing led to an order entered by the District Court on March 11, 2003. On May 1, 2003, the District Court issued a Memorandum Opinion regarding the continuation of business between Amtrak and the Debtor and regarding the Bond that the District Court had ordered to be posted by the Debtor. (Amtrak's Mot., Ex. 10.) In the Memorandum Opinion, the Court also observed that "this matter has amassed an extensive history that has unfolded through a number of filings and a series of hearings before this Court." (Id. at 1.) On June 6, 2003, the United States Court of Appeals for the District of Columbia issued its opinion regarding the arbitrability of the disputes between Amtrak and the Debtor. National Railroad Passenger Corp. v. Expresstrak, L.L.C., 330 F.3d 523 (D.C. Cir. 2003). That decision reversed the ruling of the District Court in which it compelled arbitration and, among other things, "remand[ed] the case to the district court for trial on Amtrak's breach claims." Id. at 531. After the remand by the Court of Appeals, Amtrak and the Debtor continued the prosecution of their litigation before the District Court for the District of Columbia. They submitted discovery requests, which remain outstanding. Amtrak filed a First Amended Complaint on September 15, 2003, and the Debtor filed an Answer and Counter Claim on September 25, 2003. The issues have been joined before this Court by only a Motion to Assume and the Amtrak Motion. However, there have been complaints, answers, counter claims, affirmative defenses and various other pleadings filed in the District Court for the District of Columbia, which have more comprehensively joined the issues between the parties.

Moreover, in this Court, the Motion to Assume and the Amtrak Motion, as discussed earlier in this opinion, are contested matters brought under Fed. R. Bankr. P. 9014. Because of Administrative Order No. 00-04, as pointed out earlier, there is no discovery unless the Court orders otherwise. If there is going to be an evidentiary hearing in this Court, then it certainly is reasonable to create an ability to conduct discovery and a schedule to govern it. However, that too would be

duplicative of the District of Columbia District Court litigation. Discovery has already commenced and the parties have already submitted proposed schedules for discovery to the District Court. With the substantial pleadings that have been filed, and hearings having been conducted and opinions having been written by the District Court for the District of Columbia, it is clear that the District Court has already invested a substantial amount of time and energy in becoming familiar with the factual and legal issues surrounding the dispute between Amtrak and the Debtor. Judicial economy does not dictate that this Court duplicate those efforts to reinvent the wheel and gain such familiarity.

Fourth, as pointed out at the hearing on November 21, 2003, both Amtrak and the Debtor have their primary trial counsel concerning the disputes between them located in Washington, D.C. Conducting the litigation in the District Court for the District of Columbia will produce a savings in the expense of the litigation for both parties.

Fifth, the Court of Appeals for the District of Columbia Circuit has already held that "section 30 of the Sublease applies to '*any* litigation with respect to *any* matter related to this lease or the [O]perative [D]ocuments.'" National Railroad Passenger Corp. v. Expresstrak, 330 F.3d at 530 (quoting Sublease § 30). Section 30 of the Sublease reads in its entirety as follows:

> LESSOR AND LESSEE EACH WAIVE ALL RIGHTS TO A TRIAL BY JURY IN THE EVENT OF ANY LITIGATION WITH RESPECT TO ANY MATTER RELATED TO THIS LEASE OR THE OPERATIVE DOCUMENTS, AND LESSOR AND LESSEE EACH IRREVOCABLY CONSENT TO THE JURISDICTION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA AND IN THE EVENT SUCH FEDERAL COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION THE COURTS OF THE DISTRICT OF COLUMBIA IN CONNECTION WITH ANY ACTION OR PROCEEDING ARISING OUT OF OR RELATING TO THIS LEASE OR THE OPERATIVE DOCUMENTS.

(Debtor's Mot. to Assume, Ex. C. at 41.) This provision clearly demonstrates that when the parties negotiated the Sublease, and each had the opportunity to bargain for and express their choice of forum, they each chose the District Court for the District of Columbia to resolve any disputes arising under

the Sublease. The Court considers this choice by the parties to be an important ingredient in determining which of two courts should conduct the litigation regarding the disputes between Amtrak and the Debtor.

Sixth, the parties each agreed at the hearing on November 21, 2003 before this Court and in their memoranda of law that the applicable law to determine whether the Operating Agreement and the Leases were terminated pre-petition is the law of the District of Columbia. In asserting its defense of course of performance, the Debtor relies primarily upon Article 2A of the Uniform Commercial Code as it is enacted in the District of Columbia and interpreted by District of Columbia courts. This fact too militates in favor having the disputes between Amtrak and the Debtor adjudicated by the District Court for the District of Columbia.

Seventh, adjudication of the Motion to Assume by this Court may result in only a partial resolution of the issues between these parties. For example, Amtrak's First Amended Complaint in the District Court for the District of Columbia (Amtrak's Mot., Ex. 14), seeks an award of damages against the Debtor. Similarly, the Debtor's Answer and Counterclaim (id., Ex. 15), seek an award of damages against Amtrak for breach of contract. Adjudication of the Motion to Assume by this Court would only provide partial resolution of the issues between the parties and would leave unresolved their respective claims for damages against each other. In contrast, litigation before the District Court for the District of Columbia can resolve all issues between the parties.

On balance, the Court concludes that there are numerous and substantial reasons why the litigation between Amtrak and the Debtor should be conducted in one forum. Ordinarily, this Court would make its own threshold determination whether a contract had been terminated pre-petition and, therefore, was not capable of being assumed under § 365(a) of the Bankruptcy Code. However, because of the pendency of the litigation in the District Court for the District of Columbia, the

extensive activity that has already taken place in that court, the familiarity of that court with the substantive laws governing the disputes between the parties, the selection of that forum by the parties, and for the other reasons set forth above, this Court concludes that it is appropriate for the District of Columbia to be the forum in which these issues are litigated. If the District Court for the District of Columbia determines that the Operating Agreement and Leases were effectively terminated under District of Columbia substantive law prior to the commencement of the bankruptcy case, there will be nothing for the Debtor to assume under § 365(a) and further litigation as to that issue before this Court will be obviated. On the other hand, if the District Court for the District of Columbia concludes that under substantive District of Columbia law, the Operating Agreement and Leases were not terminated pre-petition, then this Court will hear at that time the Debtor's request in its Motion to Assume to assume these contractual relationships under § 365(a). Therefore, the Court will hold the Debtor's Motion to Assume in abeyance.

Accordingly, the Court will stay any further proceedings on the Motion to Assume before this Court pending the outcome of the litigation between Amtrak and the Debtor now before the District Court for the District of Columbia. Further, the Court will modify the automatic stay of § 362(a) to permit Amtrak and the Debtor to continue to prosecute such litigation, including any claims and counterclaims, except that the stay will remain in effect with respect to the enforcement by Amtrak of any money judgment that it obtains against the Debtor in the District of Columbia District Court.

VI. Amtrak's Motion for Relief as to the Bond

Amtrak's Motion for Relief also asks the Court to lift the stay to allow Amtrak to access the Bond. Unlike the declaratory form of relief requested in the Amtrak Motion, here the Amtrak Motion seeks to modify the automatic stay for cause under § 362(d)(1). The Bond consists of the sum of $110,000 which the Debtor was required to post by the order of the District Court for the District of

Columbia on March 11, 2003. (Amtrak's Mot., Ex. 9.) There was an earlier order entered on January 27, 2003 which required a bond in the amount of $857,415. The March 11, 2003 order reduced the amount of the Bond to $110,000. Neither the January 27, 2003 order nor the March 11, 2003 order addressed the respective property interests in the Bond of either Amtrak or the Debtor. However, it is obvious from a review of those orders and from the District of Columbia District Court's Memorandum Opinion of May 1, 2003, that the Bond was intended to provide a form of security for Amtrak in the event that it should suffer financial losses during the pendency of the preliminary injunction. In its Memorandum Opinion, the District Court described it as "the bond that it imposed as security for the preliminary injunction . . . ." (Id., Ex. 10 at 14.) Section 541 of the Bankruptcy Code describes property of the estate. The broad description contained in that section includes all legal and equitable interests of the Debtor in property as of the commencement of the case wherever located and by whomever held. Under § 541(a)(1), it appears to the Court that the Debtor continues to have an interest in the Bond as property of the estate. On the other hand, it also appears to the Court that Amtrak has an interest in the Bond although its interest appears to be one of security. There has been no allegation made that the interest of Amtrak in the Bond is diminishing in value or that there is other activity that may cause an erosion of Amtrak's interest in the Bond. Accordingly, this Court does not find that Amtrak has made a showing of cause to lift the stay with respect to the Bond.

However, in view of the fact that the Court has already concluded that the District of Columbia District Court is the more appropriate jurisdiction to adjudicate the disputes between Amtrak and the Debtor arising out of the Operating Agreement and the Leases, and has determined to lift the automatic stay to permit the parties to each go back to the District of Columbia District Court to continue the litigation in that forum, the Court will also lift the automatic stay to permit Amtrak to file its motion in the District Court to recover the Bond. Although it is not clear from the record before this Court

what each of the party's property interests in the Bond may be, since it was the District Court for the District of Columbia that ordered the imposition of the Bond and took the testimony and other evidence that led to that order, the District of Columbia District Court is best able to identify the rights of the parties to the Bond and determine whether the Bond should be released to Amtrak. Accordingly, the Court will grant that portion of the Amtrak Motion that seeks to lift the automatic stay to prosecute its rights in the District of Columbia District Court regarding the Bond.

VII. Conclusion

In summary, the Court grants in part and denies in part Amtrak's motion for relief from the automatic stay. Specifically, the Court denies Amtrak's request for a determination that the automatic stay does not apply and grants Amtrak's motion with respect to the Bond. Further, the Court stays the Debtor's motion to assume executory contracts, and modifies the automatic stay for the limited purpose of permitting the parties to continue litigation in the District Court for the District of Columbia. The parties shall enter an order consistent with this opinion.

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PHILLIP J. SHEFFERLY
U.S. BANKRUPTCY JUDGE

Dated:

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